U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 01Oct2002

CASE NO.: 2002-LHC-00404

OWCP NO.: 07-155328

IN THE MATTER OF

JOHNNY E. RYAN,
Claimant

v.

INGALLS SHIPBUILDING, INC.,
Employer

APPEARANCES:

RICKEY J. HEMBA, ESQ.
On behalf of the Claimant

PAUL M. FRANKE, JR., ESQ.
On behalf of the Employer

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Johnny E. Ryan (Claimant) against Ingalls Shipbuilding, Incorporated (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Biloxi, Mississippi, on June 20, 2002. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1. Joint Exhibit 1;

2. Claimant's Exhibits 1-7; and
3. Employer's Exhibits 1-5.

Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I find as follows:

I. STIPULATIONS

During the course of the hearing the parties stipulated and I find as related to Case No. 2002-LHC-00404 (JE-1):

1. Jurisdiction to this claim exists under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq.

2. An injury or accident to Claimant's right hip occurred on January 11, 1999.

3. The injury occurred within the course and scope of employment.

4. An employer/employee relationship existed between Employer and Claimant at the time of the accident.

5. A timely Notice of Controversion was filed.

6. Claimant's average weekly wage at the time of injury was $584.75.

7. Claimant returned to work full duty on August 16, 2001.

8. Total medical benefits paid to date: $183.42.

9. Date of maximum medical improvement (MMI): June 28, 2001.

II. ISSUES

The unresolved issues in this proceeding are:

1. Causation.
2. Nature and extent of disability.
3. Medical expenses.

III. STATEMENT OF THE CASE

Summary

Claimant slipped and fell at work injuring his right hip. Employer asserts Claimant only suffered a temporary aggravation of a pre-existing condition. Claimant asserts that his ongoing hip pain and eventual hip replacement surgery are causally related to his work accident.

Claimant's Testimony

Claimant is a fifty-three year old man from Ocean Springs, Mississippi, who works for Employer as a pipefitter. (Tr. 12-14). He is a high school graduate. (EX. 5, p. 4). Claimant has worked in shipyards for most of his life. (EX. 5, p. 4). He has been employed by Employer on two occasions. (Tr. 13). Claimant first worked for Employer in the early 1970s as a pipefitter. (EX. 5, p. 7). He went back to work for Employer in September 1991 and has worked there ever since. (Tr. 13-14). Claimant makes the same amount of pay as other workers in the same employment with the same level of seniority. (Tr. 28).

On January 11, 1999, Claimant was on the day shift working in the liquid mud compartment, which was surrounded by machinery. (Tr. 14). In order to get from one side of the ship to the other, the workers had to walk across a ten inch piece of galvanized pipe. (Tr. 14). Some oil had been spilled on the pipe, and when Claimant stepped onto the pipe, he fell onto his hip bone. (Tr. 14-15). After a welder cleaned the oil off Claimant, Claimant went to the company hospital. (Tr. 15). At the hospital, Claimant was diagnosed with a bruised hip, put on light duty for four days and given some ibuprofen for his pain. (Tr. 15). Claimant testified that he did not miss work after the accident, although he did take some personal vacation time whenever his hip began to cause him more pain after he was back on regular duty. (Tr. 15, 24). He did not see any doctors for his injury. (Tr. 16).

On September 3, 1999, Claimant re-injured his hip at work. (Tr. 16). He testified that his hip began to give him more problems after that. (Tr. 24). When he went to the company hospital, x-rays of his hip were taken and he was given permission to see a doctor. (Tr. 16). At the company hospital, Claimant was told that his hip showed the first stages of arthritis. (Tr. 16). He was referred to Dr. Jim Hudson through workman's comp. (Tr. 16).

On September 13, 1999, Claimant saw Dr. Hudson for the first time, and he confirmed the diagnosis from the company hospital regarding Claimant's hip arthritis. (Tr. 17). Claimant testified that at this first visit, Dr. Hudson said that there was nothing he could do because Claimant's hip "was in the first stages of a hurt limb." (Tr. 17). Dr. Hudson did not recommend any time off and told Claimant that he could continue to work until his hip required an operation. (Tr. 17). In October, Claimant fell and cracked two ribs at work and again injured his hip. (Tr. 17). The doctor said that he could treat Claimant for the ribs[1] but not for the hip. (Tr. 17). When Claimant went to workman's comp, he was told that they had closed the case on his hip injury. (Tr. 17).

Claimant's hip continued to hurt, and when he returned to Dr. Hudson, the doctor told him that he would just have to bear the pain. (Tr. 18). Claimant remained on ibuprofen for his pain. (Tr.

[1] The injury that Claimant suffered to his ribs is not an issue in this case. (Tr. 32).

18). In October 2000, Claimant and Dr. Hudson discussed the possibility of surgery. (Tr. 18). Dr. Hudson explained that since Claimant's hip socket was worn flat, it was only a matter of time before he would need an operation on it. (Tr. 18). Claimant told Dr. Hudson that he wished to continue working for as long as he could but that he had to take his own vacation time because workman's comp would not cover any of his expenses and he would be fired if he filed for time restrictions. (Tr. 18).

Claimant underwent a complete hip replacement on February 6, 2001. (Tr. 18-19). He had taken a vacation day on February 5, 2001, right before the surgery. (Tr. 31). Claimant testified that he was in the hospital for about five or six days after the operation. (Tr. 19). He did not return to work for several months after that. (Tr. 31). Employer did not pay any of Claimant's medical expenses during that time, but Claimant drew about $205 a week in disability income. (EX. 5, p. 27). Claimant testified that he called workman's comp in July but they said they could not put him back to work while his case was pending. (Tr. 19). Employer would not put Claimant back to work because of his restrictions. (Tr. 19). Claimant eventually convinced Dr. Hudson to lift his restrictions so that Claimant could return to work, even though Dr. Hudson did not want to do so. (Tr. 19). Claimant explained that if Dr. Hudson had kept him on light duty, Employer would have fired him. (Tr. 25).

Claimant returned to work in mid-August 2001 and has been working for Employer ever since. (Tr. 19-20). Currently, he is working in the pipe shop because the work is less strenuous, and Dr. Hudson had told Claimant that he might only have two good years with his new hip if he returned to work in the shipyard. (Tr. 20). Claimant explained that the pipe shop job does not require him to do any heavy lifting. (Tr. 20). He has continued to have hip problems even after the hip replacement. (Tr. 20). Dr. Hudson is the only doctor who has treated Claimant for his condition. (Tr. 25).

On cross-examination, Claimant was asked about other prior injuries that he had suffered before returning to work for Employer in 1991. (Tr. 21-22). Claimant stated that he had lost his right eye in a football injury in 1966. (Tr. 23). Claimant testified about his involvement in a train accident in 1990 and answered questions about the various injuries that he had sustained. (Tr. 21-22). Claimant was also questioned about other legal cases in which he has been involved, including a hearing loss case and an asbestos case, both against former employers. (Tr. 23). He acknowledged receiving settlement money from some third party manufacturing defendants. (Tr. 23).

When questioned about discrepancies between his deposition and his hearing testimony, Claimant did not remember saying in his deposition that he began losing time after his surgery on May 5, 2001. (Tr. 24). He denied changing dates that he had given in his deposition. (Tr. 24). Claimant testified that it was "probably about a year" after his work injury that he began missing time at work. (Tr. 24-25). Claimant acknowledged that he continued to work after his injury, despite being told not to by his doctor. (Tr. 25). He has continued to work forty-hour weeks since returning to work last fall and testified that he went to see Dr. Hudson about his hip twice during that time. (Tr. 26).

When questioned about the purpose of his visit to Dr. Hudson on April 17, 2002, Claimant stated that there was a sharp pain in his hip and he was also seeking clarification of the doctor's diagnosis because he was confused by some documents that his attorney had given him. (Tr. 27, 29-30). Claimant testified that Dr. Hudson had x-rayed his hip five times during that visit and it had cost him $325. (Tr. 27). He said that he had made the appointment with Dr. Hudson before speaking with his attorney about the upcoming hearing. (Tr. 27). Claimant denied that the purpose of his visit was to get Dr. Hudson to help him with his legal case. (Tr. 28-30). He stated that he just wanted Dr. Hudson to explain his responses to some questions that he had been asked in a letter from Employer's representative. (Tr. 28-30).

Since the incident on January 11, 1999, Claimant has received three pay raises. (Tr. 28). He is still permanently employed with Employer at this time and testified that his job as a pipefitter is a necessary part of the shipbuilding operation. (Tr. 29).

Medical Records of Dr. Jim Hudson, M.D.

Claimant first saw Dr. Hudson on September 13, 1999. (EX. 4, p. 1). According to Dr. Hudson's report, Claimant initially began having pain in his right hip after a workplace accident in which he slipped and fell onto his right hip and buttock. (EX. 4, p. 1). After a few days, Claimant returned to work but sometimes experienced flare-ups of pain in his hip. (EX. 4, p. 1). About a week before his visit to Dr. Hudson, Claimant had another workplace accident in which he had stepped on a cable and twisted his leg, causing him some pain in the right groin area. (EX. 4, p. 1). He was examined at Employer's company hospital and referred to Dr. Hudson for an orthopedic follow-up. (EX. 4, p. 1). Claimant told Dr. Hudson that he had no previous injury to his hip. (EX. 4, p. 1).

When Claimant stood during the examination, Dr. Hudson noted "obvious antalgia" as well as restricted movement in the internal and external rotation of his hip. (EX. 4, p. 1). When Dr. Hudson examined some x-rays provided by Claimant, he diagnosed what appeared to be avascular necrosis of the right femoral head. (EX. 4, p. 1; CX. 6). Based on that diagnosis, Dr. Hudson stated that the only surgical option for Claimant would be a hip replacement which should be performed whenever his hip hurt him enough for it to be done. (EX. 4, p. 1). He explained that there is no medication or surgical procedure that can reverse the avascular segment of the bone and that this condition was likely to give Claimant "persistent symptoms." (EX. 4, p. 1).

Dr. Hudson did not think that Claimant's hip was dislocated, nor could he say "to a reasonable medical probability" that the hip problem was solely the result of Claimant's workplace injuries. (EX. 4, p. 1). Dr. Hudson did not place any formal restrictions on Claimant's activity. (EX. 4, p. 1). He noted that Claimant would probably have to modify his activity based on his comfort level and degree of pain. (EX. 4, p. 1).

Claimant next saw Dr. Hudson onAugust 23, 2000, nearly a year after his first visit, complaining of pain in his right hip and groin. (EX. 4, p. 2). At that time, Claimant expressed his belief that his pain was secondary to his workplace injury. (EX. 4, p. 2). Upon physical examination,

Dr. Hudson reported that Claimant had very limited rotation in his right hip and that the extremes of rotation caused him pain. (EX. 4, p. 2). Dr. Hudson took x-rays which showed that Claimant's weightbearing superior femoral head had collapsed, which was typical of someone suffering from avascular necrosis. (EX. 4, p. 2). They discussed changing Claimant's anti-inflammatory medication, which Claimant ultimately decided against. (EX. 4, p. 2). Dr. Hudson reiterated his opinion that Claimant would eventually need a total hip replacement once he could no longer control his pain with medication. (EX. 4, p. 2). Dr. Hudson stated that Claimant would most likely be on permanent work restrictions after such a surgery and would be unable to return to his employment as a pipefitter. (EX. 4, p. 2). Claimant told Dr. Hudson that he would take his options under advisement. (EX. 4, p. 2).

About six weeks after this visit, on October 11, 2000, Employer's claims adjuster mailed a questionnaire to Dr. Hudson, which he filled out and returned. (EX. 4, p. 3). In response to the questions, Dr. Hudson affirmed the opinion that Claimant's January 1999 work injury caused a temporary aggravation of his pre-existing condition of avascular necrosis. (EX. 4, p. 3). Dr. Hudson stated that he had never formally restricted Claimant from work and that the avascular necrosis was not caused by Claimant's work injury but rather was exacerbated by it. (EX. 4, p. 3).

On October 25, 2000, Claimant presented to Dr. Hudson with complaints that his right groin pain was increasing with activity and that his pain was "slowly progressively worsening." (EX. 4, p. 4). Again Dr. Hudson noted that Claimant experienced pain when rotating his hip during examination. (EX. 4, p. 4). Dr. Hudson reviewed Claimant's x-rays and speculated that the subchrondral collapse first observed in August 2000 had probably increased. (EX. 4, p. 4). Claimant told Dr. Hudson that he wanted to undergo the right hip replacement after the first of the year and Dr. Hudson prescribed Celebrex for Claimant's pain in the interim. (EX. 4, p. 4).

On January 15, 2001, in response to another query from Employer's claims adjuster, Dr. Hudson stated that the temporary aggravation in Claimant's pre-existing condition due to his January 1999 work injury had lasted approximately three months. (EX. 4, p. 5).

On January 16, 2001, Claimant presented to Dr. Hudson with complaints of pain in the right groin and buttock area. (EX. 4, p. 6). Although the Celebrex was not helping with the pain, which had been occurring at night for the previous three weeks, Claimant was able to relieve some of his pain by taking Ultram. (EX. 4, p. 6). Dr. Hudson made several of the same observations regarding Claimant's right hip and also took new x-rays which showed that there was some progression in the collapse of the right femoral head. (EX. 4, p. 6). Dr. Hudson believed that there might also be some early avascular necrosis in the left femoral head but that it was not yet symptomatic. (EX. 4, p. 6). He scheduled Claimant for hip replacement surgery. (EX. 4, p. 6).

The right hip replacement surgery took place on February 6, 2001. (Tr. 18-19; CX. 7, p. 9). On June 28, 2001, Dr. Hudson placed Claimant on work restrictions, specifically that Claimant was not to climb ladders or engage in crawling activity except on a limited basis. (CX. 5; CX. 7, p. 11). In August 2001, Claimant returned to work. (Tr. 19-20).

On April 17, 2002, Dr. Hudson recorded a visit that he had with Claimant that day. (CX. 7, p. 9). According to Dr. Hudson, Claimant asked for clarification of the doctor's opinion regarding his work status and the causation of his avascular necrosis. (CX. 7, p. 9). Dr. Hudson reiterated his opinion that the avascular necrosis most likely predated Claimant's January 1999 injury. (CX. 7, p. 9). Dr. Hudson based this opinion on the fact that the injury suffered by Claimant at work is not the type of injury that would cause avascular necrosis. (CX. 7, p. 9). He acknowledged that it was possible that Claimant's condition was related to his work injury but in his opinion, it was unrelated. (CX. 7, p. 9). Dr. Hudson also reiterated his opinion that the January 1999 work injury temporarily exacerbated Claimant's pre-existing condition for about three months after the incident. (CX. 7, p. 9). He explained that this determination was not indicative of how long he expected that Claimant would be off work after his surgery. (CX. 7, p. 9). Dr. Hudson explained that the surgery had been performed on February 6, 2001, and that he released Claimant to work with permanent restrictions on June 28, 2001. (CX. 7, p. 9). However, Dr. Hudson then released Claimant to normal duty without restrictions as per Claimant's own request on August 16, 2001. (CX. 7, p. 9). Dr. Hudson stated that Claimant was now working with only self-imposed precautions. (CX. 7, p. 9).

IV. DISCUSSION

Credibility

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indem. Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Ass'n, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g 990 F.2d 730 (3d Cir. 1993).

In the instant case, I found Claimant to be a credible witness, and accordingly, I took into account his subjective complaints regarding his hip pain when weighing the medical evidence in this case.

Causation

Section 20(a) of the Act, 33 U.S.C. § 920(a), provides a claimant with a presumption that his injury was causally related to his employment if he establishes that he suffered a physical injury or

harm and that working conditions existed or a work accident occurred which could have caused, aggravated or accelerated the condition. Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989).

The first prong of Claimant's prima facie case requires him to establish the existence of a physical harm or injury. The Act defines an injury as the following:

> accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.
> 33 U.S.C. § 902 (2).

An accidental injury occurs when something unexpectedly goes wrong within the human frame. See Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968). Additionally, an injury need not involve an unusual strain or stress, and it makes no difference that the injury might have occurred wherever the employee might have been. See Wheatley; Glens Falls Indemnity Co. v. Henderson, 212 F.2d 617 (5th Cir. 1954).

The claimant's uncontradicted credible testimony may alone constitute sufficient proof of physical injury. Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990); Golden v. Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980). In relating the injury to the employment, however, the claimant must show the existence of working conditions which could have conceivably caused the harm alleged. See Champion v. S&M Traylor Bros., 690 F.2d 285, 295 (D.C. Cir. 1982).

In this case, the Parties stipulated that an injury or accident to Claimant's right hip occurred on January 11, 1999, while Claimant was in the course and scope of his employment. (JE-1). It is also uncontroverted that Claimant had two subsequent work place accidents in which he further injured his right hip and that he subsequently had to undergo a total right hip replacement. Accordingly, I find that Claimant has satisfied the first prong of the 20(a) presumption.

The second prong of Claimant's prima facie case requires him to show the occurrence of an accident or the existence of working conditions which could have caused, aggravated or accelerated the condition. The 20(a) presumption does not assist Claimant in establishing the existence of a work-related accident. Mock v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 275 (1981). Therefore, like any other element of his case to which a presumption does not apply, Claimant has the burden of establishing the existence of such an accident by a preponderance of the evidence.

The Court must weigh all the record evidence, whether it supports or contradicts Claimant's testimony, in order to determine whether Claimant has met his burden in establishing the existence of a workplace accident.

Claimant in this case has testified that he injured his hip at work in January 1999 when he slipped and fell on a large pipe where some oil had been spilled. I found Claimant to be a credible witness, and Employer has not controverted Claimant's testimony regarding how the accident occurred. Therefore, I find that Claimant has met the second prong of the test and is entitled to the 20(a) presumption.

Once the presumption is invoked, the burden shifts to the employer to rebut the presumption by presenting substantial countervailing evidence that the injury was not caused by the employment. See 33 U.S.C. § 920(a). The Fifth Circuit addressed the issue of what an employer must do in order to rebut a claimant's prima facie case in Conoco v. Director, OWCP, 194 F.3d 684 (5th Cir. 1999). In that case, the Fifth Circuit held that to rebut the presumption, an employer does not have to present specific and comprehensive evidence ruling out a causal relationship between the claimant's employment and his injury. Rather, to rebut a prima facie presumption of causation, the employer must present substantial evidence that the injury is not caused by the employment. Noble Drilling v. Drake, 795 F.2d 478 (5th Cir. 1986), cited in Conoco, 194 F.3d at 690. An unequivocal opinion, given to a reasonable degree of medical certainty, that the employee's injury is not work-related is sufficient to rebut the presumption. Charpentier v. Ortco Contractors, Inc., No. 00-0812 (BRB May 9, 2001) (citing O'Kelley v. Department of the Army/NAF, 34 BRBS 39 (2000)).

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1982); Del Vecchio v. Bowers, 296 U.S. 280 (1935).

In this case, Employer has introduced the medical records of Dr. Jim Hudson, Claimant's orthopedic surgeon, in order to show that Claimant's pre-existing condition of avascular necrosis was only temporarily exacerbated by his January 1999 workplace injury. On several occasions, Dr. Hudson has stated his medical opinion that the January 1999 injury only temporarily exacerbated Claimant's condition, for about three months. During that time, Claimant was not on leave from work and only used his vacation days whenever his hip was hurting. Dr. Hudson has never discussed any connection between Claimant's September 1999 injury and his pre-existing condition. Further, Dr. Hudson has specifically stated that while it is possible that Claimant's pre-existing condition was related to the January 1999 workplace injury, in his opinion, the two are not related. According to Dr. Hudson, the workplace injury suffered by Claimant is not the type of injury that would cause avascular necrosis. Claimant has not seen any other doctors for his hip problems, and there is no medical evidence in the record to contradict Dr. Hudson's opinion. I find that Employer has provided sufficient medical evidence to rebut the 20(a) presumption, and I must now weigh the medical evidence against Claimant's testimony in order to determine whether causation exists.

While Employer does not dispute that Claimant suffered a workplace injury to his hip on January 11, 1999, Employer argues that this injury did not contribute to Claimant's need to undergo hip replacement surgery almost two years later. In support of its position, Employer relies upon the medical reports of Dr. Hudson. When Dr. Hudson first examined Claimant, he stated that he could not say "to a reasonable medical probability" that Claimant's hip problem was solely the result of Claimant's workplace injuries. Implicit in this statement is the fact that Dr. Hudson could also not say that Claimant's hip problem was totally unrelated to his workplace injuries. While Dr. Hudson eventually concluded that Claimant's January 1999 injury merely caused a temporary exacerbation of Claimant's pre-existing degenerative hip condition, he also acknowledged the possibility that Claimant's condition was related to his January 1999 injury, even though in his opinion, the two were unrelated.

Claimant, on the other hand, argues that the January 1999 injury sufficiently aggravated his pre-existing avascular necrosis to require him to undergo surgery in order to alleviate his pain and continue working. Claimant has testified that he experienced flare-ups in hip pain throughout the period between January 1999 and September 1999 and had to use his vacation time to stay home from work when his pain increased. Claimant has testified that his hip gave him more trouble after he re-injured it on the job in September 1999. At that time, Claimant was sent to Dr. Hudson, who determined that Claimant was suffering from avascular necrosis and would eventually need surgery. Claimant therefore argues by implication that these two workplace injuries must have aggravated his hip arthritis. Although Dr. Hudson's opinion is that the January 1999 injury caused only a temporary exacerbation in Claimant's symptoms which was gone in about three months after the injury, Claimant has testified that his pain continued up to and after his second injury, eight months later. Since Claimant did not even see Dr. Hudson for the first time until after his September 1999 workplace injury, it is difficult to know how Dr. Hudson could reach the conclusion that Claimant has sustained a temporary aggravation of three months after his January 1999 injury when he did not even treat Claimant at that time.

As between Dr. Hudson and Claimant, Claimant is the only person who knows how long his hip pain continued after the January 1999 injury, and based on his testimony, the flare-ups of pain continued throughout the eight month period before his degenerative arthritis was diagnosed. In addition, despite the fact that Dr. Hudson does not believe that there is a connection between the January 1999 injury and Claimant's subsequent need to undergo hip surgery, Claimant never had a history of hip problems before the January 1999 accident, which suggests that the injury in question was more than a mere "temporary exacerbation" of a pre-existing condition. Claimant's pain and condition worsened after his second accident at work in September 1999. Further, just as there is no other doctor who can disagree with Dr. Hudson's findings, there is also no other medical evidence in the record to support his opinion with regard to the cause of Claimant's hip problems, specifically with regard to the degree of aggravation that resulted from the January 1999 injury. While I have no reason to doubt the credibility of Dr. Hudson's medical opinion, I also give great weight to Claimant's testimony regarding his medical history and the onset of his hip problems. Based on a careful weighing of the evidence in this case, I find that causation exists as Claimant's pre-existing hip condition was aggravated and accelerated as a result of his work place accident.

Nature and Extent

Having established work-related injuries, the burden rests with the claimant to prove the nature and extent of his disability, if any, from those injuries. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989); Trask, 17 BRBS at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette W. Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enter., Ltd., 14 BRBS 395 (1981).

The parties stipulated, and I find, that Claimant reached MMI on June 28, 2001, the day Dr. Hudson released Claimant to work with restrictions.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the Act means an incapacity, as a result of injury, to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. § 902(10). In order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Economic disability includes both current economic harm and the potential economic harm resulting from the potential result of a present injury on market opportunities in the future. Metropolitan Stevedore Co. v. Rambo (Rambo II), 521 U.S. 121, 122 (1997). A claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss or a partial loss.

A claimant who shows he is unable to return to his former employment has established a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total compensation until the date on which the employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991).

Dr. Hudson released Claimant to work with restrictions (not to climb ladders or crawl except on a limited basis) on June 28, 2001. On that day, Employer decided that Claimant could not return to his job with those restrictions. (CX. 5). Claimant was unemployed for about six weeks, until he got Dr. Hudson to remove all restrictions on August 16, 2001. Once Claimant was released to normal duty without restrictions, he was able to return to his job with Employer. Claimant has remained at his job since that time.

Since Claimant could not return to work while he was recovering from his surgery, he is entitled to temporary total disability benefits up to the date of MMI. Because Claimant was unable to return to his former employment for an additional six weeks after initially reaching MMI, he has established a prima facie case for permanent total disability for that period of time. Employer has presented no evidence of suitable alternative employment during this period. I find that Claimant is entitled to temporary total disability payments for his time lost between the surgery and the time of MMI as well as permanent total disability payments for the six weeks that he was unable to return to work after reaching MMI.

I note that a hip injury is properly compensated under the schedule at Section 8(c)(2) of the Act. See Davenport v. Apex Decorating Co., 13 BRBS 1029 (1981). No evidence has been presented as to what, if any, impairment rating Claimant was given for his hip injury. Accordingly, the Court will not enter any finding concerning permanent partial disability.

Medical Expenses

Section 7 of the Act provides in pertinent part: "The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). In order to assess medical expenses against an employer, the expenses must be reasonable and necessary. Pernell v. Capital Hill Masonry, 11 BRBS 582 (1979). Therefore, I hold Employer must pay for all reasonable and necessary expenses related to Claimant's medical treatment resulting from his workplace injury of January 11, 1999. As part of these reasonable and necessary expenses, Employer must pay for all expenses related to the total hip replacement surgery undergone by Claimant in February 2001.

Conclusion

Based on the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following compensation order. All other issues not decided herein were rendered moot by the above findings.

ORDER

It is hereby ORDERED, JUDGED AND DECREED that:

1. Employer shall pay Claimant temporary total disability benefits from February 6, 2001, the date of Claimant's hip replacement surgery, to June 28, 2001, the date that Claimant reached MMI, based on an average weekly wage of $584.75.

2. Employer shall pay Claimant permanent total disability benefits from June 28, 2001, to August 16, 2001, the date that restrictions were lifted and Claimant returned to work, based on an average weekly wage of $584.75.

3. Employer shall compensate Claimant for all reasonable and necessary medical expenses relating to Claimant's workplace injury of January 11, 1999, and Claimant's subsequent hip replacement surgery.

4. Employer shall receive a credit for benefits and wages paid.

5. Within thirty days of receipt of this Order, counsel for Claimant should submit a fully-documented fee application, a copy of which shall be sent to all opposing counsel who shall have twenty days to respond.

6. All computations of benefits and other calculations which may be provided for in this order are subject to verification and adjustment by the District Director.

ORDERED this 1st day of October, 2002, at Metairie, Louisiana.

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LARRY W. PRICE
Administrative Law Judge

LWP:bab